United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2352

To be argued by
DONALD B. DA PARMA

United States Court of Appeals
FOR THE SECOND CIRCUIT

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and other similarly situated,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK

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Index No. 74-2352

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR DEFENDANT-APPELLEE BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK

Nature of the Case

Plaintiffs bring this appeal from a final order of the United States District Court for the Southern District of New York rendered by Judge Whitman Knapp on October

10, 1974 dismissing Plaintiffs' Complaint (313a-14).* That complaint charged defendants with discrimination against plaintiff employees of the City of New York (the "City") on the basis of sex because of the manner in which pregnancy and maternity were treated in certain employee benefit programs. Specifically, discrimination was alleged—

First, (in counts one through three) by operation of the health and hospitalization coverage provided by the City to all its employees;

Second, (in counts four through six) by operation of certain disability insurance programs; and

Third, (in counts seven through eleven) by operation of certain leave policies.

This brief is addressed only to the first of these three claims as defendant Blue Cross & Blue Shield of Greater New York ("Blue Cross") is named only as having "aided and abetted" the City in its alleged discrimination with regard to the health and hospitalization insurance policy.

The Coverage Complained of

The maternity coverage to which complainants object is that provided under a basic hospitalization contract purchased by the City from Blue Cross (Complaint ¶¶ 52-54 at 28a-31a), and that which was provided under a contract between the City and United Medical Service, Inc. ("UMS")**

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* Numbers in parentheses followed by the letter "a" are references to the Appendix filed by Plaintiffs-Appellants.

** Subsequent to the filing of the Complaint herein Associated Hospital Service of New York (the greater New York metropolitan area Blue Cross Plan) and United Medical Service, Inc. (the greater New York metropolitan area Blue Shield Plan) consolidated to form Blue Cross and Blue Shield of Greater New York, which was substituted as a defendant herein.

cancelled as of October 1, 1973. Complaint ¶¶ 55, 56 at 31a-32a. This coverage plaintiffs correctly state as being "negotiated . . . and provided by defendant City" (Complaint ¶ 51 at 28a), which is to say the City selects the coverage to be provided and the City pays the premiums. Blue Cross offers to sell additional maternity coverage to subscriber groups, and some City employee health and welfare funds have purchased additional maternity coverage from Blue Cross for those employees whom they represent. Answer of Blue Cross ¶ 54 at 81a.

While there is no question that the coverage for normal maternity expenses purchased by the City for its employees and their dependents is less than than provided for most other medical and surgical experiences,* there is also no question that the coverage provided applies equally to employees and dependents, and thus is the same for female

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* The basic contract purchased by the City from Blue Cross and Blue Shield affords coverage for maternity as follows: an allowance of $80.00 toward hospital charges for normal delivery or an elective abortion, either in the inpatient or outpatient department of an accredited hospital; and, for conditions arising out of and during pregnancy, an allowance of $10.00 per day for up to 8 days of care rendered prior to hospitalization during which pregnancy is terminated. However, for Caesarean Section, spontaneous termination of pregnancy during the first six months, for termination of an ectopic pregnancy and for certain other surgical terminations, regular Hospital Benefits are provided from the date of termination, less the days of care previously provided, if any.

The basic contract purchased by the City from UMS provided coverage for maternity as follows: an allowance of $150.00 for normal delivery and any surgery in connection with such delivery and for customary pre-natal and post-natal care, or an allowance of $138.00 for an elective abortion; larger allowances for various surgical expenses in connection with any condition arising out of and during pregnancy but not included as an expense for normal delivery; and inclusion under Major Medical coverage of expenses from ectopic pregnancy, miscarriage, Caesarean Section, and severe medical complications arising out of pregnancy and childbirth, to the extent that expenses exceed benefits payable under the basic coverage.

employees as it is for the female dependents of male employees. Accordingly, every employee receives the same coverage for the expenses attendant to childbirth, whether it is the (female) employee who is pregnant, or the (female) dependent of the (male) employee who is pregnant.

Yet, in the face of this equality of treatment, Plaintiffs here—who include both male and female employees of the City—assert that by this coverage they have all "been subjected to discrimination in the terms and conditions of their employment on the basis of sex." Complaint ¶ 54 at 31a. See also ¶ 56 at 32a. And Plaintiffs further aver that defendant Blue Cross has discriminated against them by having "aided and abetted the defendant City in its illegal discriminatory acts" solely on the basis that it has "negotiated and entered into health and hospital insurance contracts which discriminate in their provisions on the basis of sex." Complaint ¶ 61 at 34a.

The Proceedings Below

Prior to the date set by Judge Knapp for the filing of preliminary motions, the Supreme Court, on June 17, 1974, rendered decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), whereupon Judge Knapp advised all counsel by letter dated June 26, 1974 (232a) that he wished to hear argument on July 11 as to whether, in light of *Aiello,* he should, *sua sponte,* dismiss the Complaint. Subsequent to that hearing, Judge Knapp dismissed, with leave to replead, the complaints in this action and in *Communications Workers of America* v. *American Telephone & Telegraph,* 8 EPD ¶ 9615 (S.D.N.Y. 1974), and certified

> . . . to the Court of Appeals pursuant to 28 U.S.C. § 1292(b) the question whether *Aiello* has established —for the purposes of these actions or either of them

—that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment. 8 EPD ¶ 9615 at 5640.

When this Court declined to hear the appeal in this case, Plaintiffs moved the District Court for a final order dismissing this action, with prejudice. Judge Knapp signed such an order on October 10, 1974 (313a-14a), and Plaintiffs filed a timely appeal (315a-17a).

Questions Presented

Accordingly, the issues now before this Court in terms relevant to Blue Cross are simply:

1. Does the allegation that the City's health and hospitalization coverage discriminates on the basis of sex state a cause of action under the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* ("Title VII") and, if pendent jurisdiction exists, under the New York State and New York City anti-discrimination statutes?

2. If this allegation does state a valid cause of action, can Blue Cross be held to have "aided and abetted" such discrimination?

ARGUMENT

I.

AS THE HEALTH AND HOSPITALIZATION POLICY UNDER ATTACK APPLIES EQUALLY TO MALES AND FEMALES, ABSENT HERE IS ANY DISCRIMINATION BECAUSE OF SEX.

The basis of Plaintiffs' conclusion that the health and hospitalization policy under attack discriminates on the basis of sex is simply that *any* recognition of pregnancy *must* be discriminatory since only women become pregnant. In their brief Plaintiffs-Appellants argue:

> Pregnancy, however, is unique to females and as a result, classification based upon it must necessarily affect *only* members of the protected class. Brief at 21.

And:

> It goes without saying that a classification on the basis of pregnancy for the purpose of determining entitlement to fringe benefits has a disproportionate impact upon women since it can never affect men. This fact, standing alone, engenders plaintiffs [sic] Title VII claim. Brief at 22.

Thus, reasoning solely from the biological reality that only women bear children, Plaintiffs would have this Court find that the lesser coverage for maternity in the health and hospital insurance policy complained of must inevitably work a discrimination because of sex even when the effects of the challenged policy apply equally to male and female employees. In so doing they ask this Court to ignore the absence of dissimilar treatment of men and

women. For, despite the fact that only women give birth to a child, parents—male and female—bear the medical cost of that event. And it is protection against that cost, borne both by male and female employees, and covered equally for male and female employees, which is the purpose and effect of the policy complained of herein, since the same health and hospital coverage for maternity is provided to all female employees as well as to the female dependents of all male employees.*

While the health and hospitalization coverage provided for maternity is indisputably less than coverage provided for most other medical and surgical experiences,** this lesser coverage impacts with blind impartiality on males and females; on fathers as well as mothers. By the same token, were maternity benefits to be increased, the benefit of such change would accrue to males as well as females. Thus, while increased health and hospitalization coverage for maternity might be a fit subject for the labor negotiating table, the absence of any discriminatory effect as against either gender precludes its being characterized as sex discrimination.

On this very issue of treatment of dependents, the Equal Employment Opportunity Commission ("EEOC") underscores the non-discriminatory nature of the challenged arrangement in its Guideline entitled "Fringe Benefits", 29 C.F.R. § 1604.9,*** which provides:

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* See, pp. 4-5, Pamphlet "A Choice of Health Plans" describing eligibility under the City's employee health and hospital insurance program (213a).

** Other limitations in coverage include exclusion for sanitorium-type, custodial or convalescent care, rest cures, and X-ray therapy and limitations on coverage for communicable diseases, pulmonary tuberculosis and mental or nervous disorders. *Id.* at 15, 16.

*** While Plaintiffs seek support in 29 C.F.R. § 1604.10, an EEOC Guideline entitled "Employment Policies Relating to Preg-

> It shall be unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not available for female employees; or to make available benefits to the husbands of female employees which are not available for male employees. *An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.* 29 C.F.R. § 1604.9(d) (emphasis added).

And in the one decision dealing with a claim similar to that Plaintiffs press here, the Court found squarely that a health and hospitalization program providing reduced maternity benefits was non-discriminatory, since it applied to both employees and dependents:

> Plaintiff's theory is that defendants group insurance program discriminates on the basis of sex because a reduced benefit is paid in the case of pregnancy when compared with hospitalizations for other causes. There is no doubt that the insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single

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nancy and Childbirth" (Brief at 12, 31), such support is misplaced. That Guideline, while speaking somewhat ambiguously of "health or temporary disability insurance or sick leave" plans (29 C.F.R. § 1604.10(b)), is clearly applicable only to maternity leave policies and temporary disability insurance.

> formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff. *Satty* v. *Nashville Gas Co.*, 384 F. Supp. 765, 766-67 (M.D. Tenn. 1974).

And placing reliance on 29 C.F.R. 1604.9(d), as well as simple logic, the Court concluded:

> So far as the issue relating to the insurance program is concerned, the court finds no distinction in the application, operation, or effect of the insurance plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit. 384 F. Supp. at 767.

That this same result obtains in the case at bar is brought home with striking clarity, for here Plaintiffs present a phenomenon unique in sex discrimination litigation—men and women claiming that one employment policy discriminates against all of them on the basis of sex. Thus, the named Plaintiffs, who include in their number a male—Robert Sussman—claim to represent a class which

> . . . is composed of (a) all female employees of the City . . . and (b) males employed by the City . . . who . . . had a wife or female dependent capable of becoming pregnant or who became pregnant. Complaint ¶ 3 at 3a-4a.

And Plaintiffs go on to assert that while the "practices" complained of are directed "uniformly" to all members of this alleged androgynous "class" (Complaint ¶ 3D at 6a), there exists nonetheless discrimination on the basis of sex. But the discrimination Plaintiffs perceive does not exist when facts are substituted for abstractions. For the plain

fact is that the health and hospitalization insurance applies equally to all employees, male and female, and thus absent is any discrimination because of sex.

II.

AIELLO ESTABLISHES THAT DISTINCTIONS BASED ON ATTRIBUTES UNIQUE TO ONE SEX DO NOT AUTOMATICALLY CONSTITUTE DISCRIMINATION BECAUSE OF SEX.

A. The Key to the Supreme Court's Opinion in *Aiello* is that Recognition of Maternity Does Not, in and of itself, Amount to Discrimination Because of Sex.

Plaintiffs' arguments here fail not only because of the absence of any discriminatory effect of the health and hospitalization insurance policy under attack, but further because the Supreme Court's decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), rejects the fallacy that lies at the heart of Plaintiffs' case—the insistence that any recognition whatsoever of sex-based characteristics must result in sex discrimination. For whatever may be the ultimate reach of the Supreme Court's decision in *Aiello,* that case clearly establishes that distinctions based on attributes unique to one gender but not universal to that gender do not automatically ". . . discriminate against any definable group . . ." since [t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 417 U.S. at 496-97. Thus, Plaintiffs' arguments based on the presumed *inevitability* of discrimination where distinctions are based on pregnancy, are squarely rejected.

The issue was focused by Mr. Justice Brennan who took the position in his dissenting opinion that ". . . dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, *inevitably*

constitutes sex discrimination." 417 U.S. at 501 (dissenting opinion) (emphasis added). To this argument the majority tersely replied, in footnote 20:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. 417 U.S. at 497 n. 20.

By thus squarely rejecting the *inevitability* of distinctions inextricably linked to one sex resulting in discrimination based on sex, the majority decision in *Aiello* has thrown out the only argument Plaintiffs here can have. For Plaintiffs here would go far beyond the position taken by Mr. Justice Brennan in his dissent (which position recognizes the necessity first of "dissimilar treatment of men and women" for there to be sex discrimination), by arguing the existence of sex discrimination *even absent dissimilar treatment of men and women* simply because the attribute recognized is unique to one sex.

In view of the checkered approach to this question of whether recognition of attributes unique to one sex amounts to discrimination on the basis of sex which is reflected in recent decisions of the lower courts under both the Equal Protection Clause and Title VII, it is not surprising that the Supreme Court chose to resolve the matter in *Aiello*. Thus, some lower court decisions have reasoned, as Mr. Justice Brennan argued in his dissent in *Aiello*, that since only women become pregnant, treatment of pregnancy in an unfavorable manner amounts, inescapably, to discrimination based on sex in violation of the Equal Protection

Clause.* This same analysis the Equal Employment Opportunity Commission ("EEOC") has applied, finding, for example, that a company's prohibition of beards on its male employees was violative of Title VII on the grounds that the ". . . policy regarding beards has an exclusive impact on males. . . ." CCH EEOC Decisions 1973, ¶ 6373 at 4687.

Conversely, other courts have concluded that when an attribute is unique to one sex—such as pregnancy or beards —no discrimination is possible, since members of the other sex cannot be "similarly situated." By way of example, one District Court found no violation of Title VII where an employer prohibited beards on male employees, precisely *because* only males can grow beards:

> The discharge of pregnant women or bearded men does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored. *Rafford* v. *Randle Eastern Ambulance Services, Inc.*, 348 F. Supp. 316, 320 (S.D. Fla. 1972). Cf. *Boyce* v. *Safeway Stores, Inc.*, 351 F. Supp. 402 (D.D.C. 1972).

And, in the same vein, the Fourth Circuit reasoned in *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds, sub nom., Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), that a maternity leave policy did not violate the Equal Protection Clause since the policy complained of could not, by necessity, amount to discrimination because of sex:

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* *See, e.g., Buckley* v. *Coyle Public School System*, 476 F.2d 92 (10th Cir. 1973); *Green* v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973); *LaFleur* v. *Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), *aff'd on other grounds*, 414 U.S. 632 (1974).

> Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. 474 F.2d at 397.

It is against this backdrop of inconsistency among lower courts in dealing with charges of sex discrimination stemming from recognition of attributes unique to one sex, brought under both the Equal Protection Clause and Title VII, that the Supreme Court fashioned its holding in the *Aiello* case.

By its decision in *Aiello,* the Supreme Court has conclusively rejected the correlation upon which Plaintiffs rely—that recognition of an attribute unique to one sex *inevitably* is equivalent to discrimination based on sex. Even before *Aiello,* Plaintiffs' contentions here were logically untenable; and with *Aiello* now on the books these contentions should be dismissed out of hand.

B. This Basic Holding of *Aiello*—Going as it Does to the Issue of the Existence or No of Discrimination —Defeats Plaintiffs-Appellants' Claims Under the Anti-Discrimination Statutes.

While the *Aiello* case (dealing as it did with a California state statute) was decided under the Equal Protection Clause of the Fourteenth Amendment, its central conclusion means that not only is there no denial of equal protection in this case, but there can be no violation of anti-discrimination statutes such as Title VII as well. For it is self-evident that if there is no discrimination, there can

be neither denial of equal protection nor violation of any anti-discrimination statute.*

Judge Knapp underscored the central importance of this point in his opinion (297a):

> The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If, as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified—or less justifiable in the employment context than in some other context—can never be reached.

While discrimination may, in certain circumstances, withstand an equal protection challenge where there is a ". . . rational basis to avoid constitutional condemnation . . ."** the basic test under the Fourteenth Amendment or under anti-discrimination statutes as to whether discrimination exists is the same: Is there "dissimilar treatment

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* See, for example, the reasoning of the Supreme Court in *Reed* v. *Reed*, 404 U.S. 71, 75 (1971), where the Court first established that the statute there in question provided ". . . that different treatment be accorded to the applicants on the basis of their sex . . .", and then, and only then, concluded that ". . . it thus establishes a classification subject to scrutiny under the Equal Protection Clause."

** By way of illustration, perhaps the clearest situation in which the courts have allowed manifest sex discrimination to withstand equal protection challenges under the rational basis test have been those dealing with the military draft. As one court noted in *United States* v. *Clinton*, 310 F. Supp. 334, 336 (E.D. La. 1970):

> Similarly, while discrimination according to sex may be unconstitutionally arbitrary in some contexts, Congressional chivalry in drafting men only to comprise an army has a sufficiently rational basis to avoid constitutional condemnation as mere male chauvinism.

for men and women who are . . . similarly situated . . . ?" *Reed* v. *Reed,* 404 U.S. 71, 77 (1971). Thus, as one court put it:

> Virtually all Title VII violations fit an equal protection definition of sex discrimination—dissimilar treatment for similarly situated men and women. . . . *Rafford* v. *Randle Eastern Ambulance Service, Inc.,* 348 F. Supp. 316, 319 (S.D. Fla. 1972).

That the Supreme Court intended its holding in *Aiello* to resolve the basic question of the existence or no of discrimination in the fact situation before it, rather than simply to decide whether any discrimination was there permissible under the Equal Protection Clause, is clearly established by its response, in footnote 20, to the dissent of Mr. Justice Brennan. Assuming, at 502-03, that the majority had found the existence of sex discrimination, he argued that the Court should employ a stricter standard in applying the Equal Protection Clause than he deemed the Court to have used, arguing, in essence, his position that sex should be, like race and national origin, an "inherently suspect" classification. 417 U.S. at 503. Thus, he stated:

> In the past, *when a legislative classification has turned on gender,* the Court has justifiably applied a standard of judicial scrutiny more strict than that generally accorded economic or social welfare programs. Compare *Reed* v. *Reed,* 404 U.S. 71 (1971), and *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), with *Dandridge* v. *Williams,* 397 U.S. 471 (1970), and *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). Yet, by its decision today, the Court appears willing to abandon that higher standard of review without *satisfactorily explaining what differentiates the gender-based classification employed in this case* from those found uncon-

> stitutional in *Reed and Frontiero.* The Court's decision threatens to return men and women to a time when "traditional" equal protection analysis sustained *legislative classifications that treated differently members of a particular sex solely because of their sex.* 417 U.S. at 502-03 (emphasis added).

This argument the majority turned aside pointing out that its basic finding was that there was no "discrimination based upon gender as such," stating—

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed,* 404 U.S. 71 (1971), and *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does *not exclude anyone from benefit eligibility because of gender* but merely removes one physical condition—pregnancy —from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. 417 U.S. at 496-97 n.20 (emphasis added).

And it is beyond serious question that this basic holding is controlling on all similar charges of sex discrimination,

whether such charges be asserted on constitutional or statutory grounds. For, in the final analysis, *Aiello* establishes that to exclude pregnancy and maternity from an insurance policy cannot in and of itself amount to discrimination based on sex since there is a "lack of identity between the excluded disability and gender as such. . . ." 417 U.S. at 497 n.20. Nor can Plaintiffs escape the applicability of this holding by arguing as they do, at pages 11-36 of their Brief, that *Aiello* is inapplicable where there are discriminatory *effects* of an otherwise neutral policy. For, as discussed in Point I hereof, there is no such discriminatory effect resulting from the health and hospitalization program here under attack.

III.

REGARDLESS OF THE MERITS OF PLAINTIFFS' CLAIMS OF DISCRIMINATION, NO CLAIM LIES AGAINST BLUE CROSS FOR "AIDING AND ABETTING."

Blue Cross—the insurance company from which the City purchased the health insurance program here complained of—is brought by Plaintiffs before the bar solely on grounds that by having ". . . negotiated and entered into . . . insurance contracts . . ." which Plaintiffs claim discriminate on the basis of sex, Blue Cross ". . . aided and abetted the City in its [alleged] discriminatory acts. . . ." Complaint ¶ 61 at 34a. Leaving aside the factual dimensions of this allegation, absent here is any basis, either in law or in any reasonable analysis of the surrounding circumstances, upon which Blue Cross can be deemed guilty of having discriminated against these Plaintiffs on the basis of sex. Thus even if the underlying claims in counts one through three are not dismissed as against all Defendants, those claims

as they relate to Blue Cross must be dismissed on the law and pleadings.*

A. Title VII Is Inapplicable to Blue Cross Acting as an Insurer.

Initially, the claims charging Blue Cross—present here only as an insurer—with "aiding and abetting" violations of Title VII, must be dismissed, as a matter of law, for the strictures of Title VII apply singularly, and with specificity, only to employers, employment agencies, labor organizations, and joint labor-management committees, as the words of the statute make clear. This limited scope of the statute may not be expanded by Plaintiffs seeking to involve the Court's jurisdiction through vague theories of accessorial liability.

Title VII states that "[i]t shall be an unlawful employment practice *for an employer* . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex. . . ." 42 U.S.C. § 2000-2(a) (emphasis added). Similarly, subparagraphs (b) and (c) proscribe discrimination by "employment agenc[ies]" and "labor organization[s]." The targets of the legislation are thus clear and specific, and nowhere does the act provide accessorial liability for "aiding and abetting." The very words of the statute thus make clear its limited applicability: unless a defendant comes within the definition of "employer", "employment agency" or "labor organization", jurisdiction under Title VII is simply lacking.**

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* Should all federal claims be dismissed, pendent state law claims will presumably likewise be dismissed, *Kavit* v. *A. L. Stamm & Co.*, 491 F.2d 1176 (2d Cir. 1974), and accordingly, are not separately treated herein.

** This limited scope of applicability comports with the legislative history of Title VII. Throughout the congressional proceed-

Thus it was, that in the proceedings underlying this action the EEOC—the Agency charged with enforcement of Title VII—concluded on May 30, 1974, that Title VII did not apply to Blue Cross in this instance. The charge involved was one of those upon which the instant suit is based: among the charging parties were Leslie Boyarsky and Barbara Robertson, Plaintiffs herein, and the same charges stated herein were presented to the EEOC, against some of the same Defendants, including Blue Cross. The EEOC, in a Determination Letter signed by the Acting District Director for New York, Freddie D. Holt, "on behalf of The Commission", dismissed the charges against the insurer Defendants, holding:

> Charging Parties Robertson and Boyarsky's sworn charges against the above noted Respondents are dismissed for lack of jurisdiction since, as insurance carriers, they are neither employers, labor organizations or employment agencies within the meaning of Title VII. Determination in *Robertson* v. *Board of Education,* Cases TNY 3-0776-7, 1174-5, 1539-41; TNY 4-0730; YNY [sic] 4-409, dated May 30, 1974, at 2n. (203a-206a)

Although no court has had occasion to rule on the specific issue of whether an insurer can be held liable for aiding and abetting a violation of Title VII, considered, and dis-

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ings, the narrow scope of the new law was made clear. House Report 914, which accompanies the report of the final bill by The Judiciary Committee, states that "Section 704(a) describes a number of activities which, *if engaged in by employers,* will constitute unlawful employment practices." U.S. Code Cong. & Admin. News, 1964, Vol. 2, at 2402 (emphasis added). In debate on the floor of the Senate, Senator Clark (D.—Pa.), one of the bill's managers, explained that the bill did not restrict freedom of employers "subject to one qualification, and that qualification is to state: 'In your activity *as an employer* . . . you must not discriminate. . . .'" 110 Cong. Rec. 13080 (emphasis added).

missed, has been an analogous attempt to extend Title VII liability beyond the limits established by the statute. In *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Cal. 1970), *aff'd per curiam*, 469 F.2d 89 (9th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973), plaintiff attempted to hold defendant, publisher of *The San Francisco Chronicle*, liable under Title VII for sex discrimination on the grounds that defendant published "want ads" separated into "Male" and "Female" headings. This claim the court dismissed on the following analysis:

> The Civil Rights Act section now under scrutiny are not made broadly applicable to all "persons," but only to "employer," "employment agencies" and "labor unions." Since the statute is neither made specifically applicable to newspapers nor made so broadly applicable as to include newspapers, there was no reason for any express exclusion, qualified or otherwise, of newspapers. Indeed, in our opinion, the absence of any such exclusion is persuasive that Congress never contemplated a claim that newspapers were included, For, if it had so contemplated, it would in all probability have added at least a qualified exclusion. . . .
>
> * * *
>
> Certainly, if the Congress intended to impose on newspapers, not only new responsibilities but also new personnel and procedural activities, it could have and in our opinion would have specified newspapers along with employers, labor unions and employment agencies. It not only did not do so, it clearly expressed its contrary intent in the legislative history leading to the passage of the legislation.
>
> If, as plaintiff argues, the legislation would be improved by inclusion of newspapers, such inclusion must

be accomplished by the Congress—not by the courts. 315 F. Supp. at 582, 583.

Thus, the claims against Blue Cross for "aiding and abetting" a violation of Title VII must be dismissed.

B. Under Any Plausible Set of Facts, Blue Cross Could Not be Deemed to Meet the Standards Required for Liability to Attach as an Aider or Abettor.

Beyond the jurisdictional inability of Blue Cross' being found guilty of "aiding and abetting" a violation of Title VII, apparent at the outset is that Blue Cross cannot be deemed to meet the standards required for liability as an aider or abettor under any basis.

Liability for aiding and abetting the unlawful act of a principal defendant requires, under federal law, "that the act is known to be tortious." Ruder, "Multiple Defendants", 120 U. Pa. L. Rev. 597, 621 (1972). Thus, aiding and abetting has been defined as "*knowing* assistance of or participation in" (emphasis added) the principal defendant's fraudulent scheme, *Pettit* v. *Amer[illegible]n Stock Exchange,* 217 F. Supp. 21, 28 (S.D.N.Y. 196[illegible] the leading case on this question, *Brennan* v. *Mid[illegible] United Life Insurance Co.,* 259 F. Supp. 673 (N.I[illegible] 1966), *motion to dismiss denied,* 286 F. Supp. 702 (N.[illegible]. Ind. 1968), *aff'd,* 417 F.2d 147 (7th Cir. 1969), *cert. denied,* 397 U.S. 989 (1970), relies principally on the *Restatement of Torts,* § 876 (1939), which provides:

> For harm resulting to a third person from the tortious conduct of another, a person is liable if he * * * (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encourage-

ment to the other so to conduct himself. . . . (emphasis added).

In view of the novel nature of the challenge to the legality of the health insurance coverage herein, it is clear that Blue Cross could not have had any reason to believe that such coverage was illegal. On the contrary, such coverage appears to be specifically validated by the Regulations of the New York State Department of Insurance, which provide at § 52.16 of Title 11, of the Official Compilation of Codes, Rules and Regulations of the State of New York, that—

Prohibited provisions and coverages

. . . .

(c) No policy shall limit or exclude coverage by type of illness, treatment or medical condition, except as follows:

(3) Pregnancy, except for complications of pregnancy. . . .

Further, as the coverage herein complained of applies equally to employees and their dependents, Blue Cross not only concluded that absent was any possibility of discrimination—a position it still maintains—but further that it comported with the EEOC Guideline, 29 C.F.R. 1604.9(d) (reprinted at page 8, supra) which requires equal maternity coverage for female employees and female dependents of male employees. Thus, Plaintiffs cannot seriously maintain that it can be established that Blue Cross participated in providing coverage which it *knew* to contravene the legal proscriptions against discrimination on the basis of sex.

Additionally, required for liability as an aider and abettor is that the defendant ". . . must act or fail to act

with the *specific intent to facilitate . . .*" (emphasis added) the illegal behavior of the principal defendant. *United States* v. *Bryant,* 461 F.2d 912, 920 (6th Cir. 1972). But upon what basis could Plaintiffs conceivably establish the inherently self-contradictory proposition that Blue Cross, a not-for-profit health insurance agency, should seek to limit the coverage purchased from it? Such allegations as must underpin liability as an aider and abettor simply will not wash.

IV.

CONCLUSION

Since January, 1973, Blue Cross has been responding to the charges of sex discrimination contained in the Complaint herein. First before the New York City Human Rights Commission, which had dropped the matter entirely; next before the EEOC, which has dismissed the charges against Blue Cross; then before Judge Knapp; and now before this Court. Throughout, Blue Cross has been swept up in the flow of a case in which it clearly does not belong. The time is long overdue for the charges against Blue Cross finally to be disposed of.

For all of the above-stated reasons, the decision of the Court below with respect to defendant Blue Cross should be affirmed.

Dated: New York, New York
February 28, 1975.

Respectfully submitted,

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State of New York,
City of New York,
County of New York, ss.:

Alfred Bush, being duly sworn, deposes and says that he is over 18 years of age. That on the 28th day of February, 1975, he served 2 copies of the within Brief upon:

Mirkin, Barre, Saltzstein & Gordon, P.C.
98 Cutter Mill Road
Great Neck, New York 11021

The attorneys for the within named, Social Service Employees Union Local 371, Social Service Employees Union Local 371 Welfare Fund, United Federation of Teachers and United Federation of Teachers Welfare Fund, by depositing 2 copies of the same, securely wrapped in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United State s Post Office at Greenwich and Vestry Streets, addressed to said attorneys for the above named at the above address, that being the address within the state where they regularly kept office, and at which place they regularly received mail.

Sworn to before me this 28th
day of February, 1975

Alfred Bush

ABRAHAM L. MEILEN
NOTARY PUBLIC, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1976

Service of 2 copies of this within
Brief is admitted this
28 day of February 1975

(1) _____
ATTORNEY FOR D.C. Health & Security Plan

(2) Arlen Lowell
Attorney for GHZ

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